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NO. 90-1668

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

THE STATE OF TEXAS,
Petitioner

VS.

HARON STEPHENS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION

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September 26, 1991

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES HARON STEPHENS, Respondent herein, by and through his attorney, Lawrence B. Mitchell, and files this his Brief in Opposition.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case presented by Petitioner as being an accurate rendition of the events which occurred below.

SUMMARY OF THE ARGUMENT

Although this Court has never explicitly ruled that acquittal for a greater crime precludes further prosecution for lesser offenses, numerous decisions have held that the Double Jeopardy Clause prohibits successive prosecutions of the same offense following acquittal or conviction. Since for double jeopardy purposes a lesser offense is by definition the same offense as the greater, an acquittal for the greater when the fact finder is silent as to a verdict on the included offense bars successive prosecutions.

A review of the relevant decisions of the Federal Courts of Appeals and State appellate courts reveals that almost without exception these courts have ruled that the Double Jeopardy Clause prohibits prosecution for a lesser offense after acquittal of the greater offense when the fact finder was silent as to a verdict on the lesser offense in the first prosecution.

The "same conduct" rule of Grady vs. Corbin is inapplicable to the instant cause. The Blockburger "same offense" test is sufficient to determine whether the Double Jeopardy Clause prohibits a second prosecution.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS

The first reason presented for granting the Writ is that the decision of the Court below is in conflict with this Court's

decisions.[1] Petitioner does not assert that the decision below decided an important question of federal law which has not been but should be settled by the Supreme Court of the United States.[2] Respondent's review of the applicable decisions of this Honorable Court reveals that the issue presented is actually one of first impression rather than one in purported conflict with prior decisions of the Court. However, assuming that the reason presented for granting the Writ will be construed broadly so as to encompass a claim of conflict between the decision below and the "spirit" of the prior decisions of this Honorable Court, Respondent will address the reason presented.

Petitioner claims that the Double Jeopardy Clause does not prohibit the State from seeking a second prosecution of Respondent for a lesser offense (rape) after he had been acquitted by appellate court reversal[3] of the greater offense (aggravated rape) in that the evidence was insufficient to establish the aggravating element of that offense.[4] Petitioner

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1 R. SUP. CT. 10.1 (c)
2 R. SUP. CT. 10.1 (c)
3 Stephens vs. State, 683 S.W.2d 23 (Tex. App. - Dallas 1984); Stephens vs. State, 717 S.W.2d 338 (Tex. Crim. App. 1986)
4 The initial indictment against Respondent alleged that he committed the offense of aggravated rape and that the aggravating element was a threat of serious bodily injury to be imminently inflicted on the complainant. See TEX. PENAL CODE ANN. sec. 21.03 (a)(2). The intermediate appellate court held that the evidence did not establish that the defendant, either individually or as a party participated in the conduct which constituted the aggravating element of the offense and thus reversed the conviction and ordered the entry of a judgment of acquittal. Stephens, 683 S.W.2d at 24. On Petition for Discretionary Review the Texas Court of Criminal Appeals affirmed the reversal of the conviction and the order of the entry of judgment of acquittal for insufficiency of the evidence to establish the aggravating element. Stephens, 717 S.W.2d at 341.

asserts that the decision of the Texas Court of Criminal Appeals[5] holding to the contrary - that the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment,[6] and a similar provision of the Texas Constitution, Art. I sec. 14, would preclude a second prosecution - conflicts with the decisions of this Court. However Petitioner concedes that at least two decisions of this Court have indicated that the exact question presented herein has not yet been decided by the Court.

In In Re Nielsen, 131 U.S. 176, 187, 9 S.Ct. 672, 33 L.Ed. 118 (1889), the Court addressed the issue of whether the Double Jeopardy Clause barred a subsequent prosecution for the offense of adultery following a conviction for the related offense of unlawful cohabitation with two women. The Court held that the second conviction for adultery was based on conduct that was part of the continuous crime of unlawful cohabitation and therefore was barred for twice placing the defendant in jeopardy. In dicta the author noted that "(w)hether an acquittal would have had the same effect to bar the second indictment is a different question, on which we express no opinion." 131 U.S. at 189, 9 S.Ct. at 676. Thus the specific issue of whether an acquittal of a greater offense will always or sometimes bar prosecution of a lesser included offense was not decided.[7] Subsequently, in Greene vs.

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[5] Stephens vs. State, 806 S.W.2d 812 (Tex. Crim. App. 1990) In resolving the issue presented the court noted that the matter was one of first impression. 806 S.W.2d at 814 n. 5.

[6] Benton vs. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1962).

[7] However the author also opined as follows: (continued)

Massey, 437 U.S. 19, 25 n.7, 98 S.Ct. 2151, 2154-55, 57, L.Ed.2d 2015 (1978), the Court noted that it was "reserving" for later decision whether an appellate reversal of a conviction for a greater offense for insufficiency of evidence precludes retrial for a lesser offense.

Petitioner does not cite to any decision of this Honorable Court which resolves the exact issue presented herein. After diligent research Respondent can find no such decision. Therefore, it would appear that such is a matter of first impression. However, there are numerous decisions by this Honorable Court which indicate that the proper resolution of this issue is that in the circumstances presented herein the Double Jeopardy Clause precludes further prosecution.

The Fifth Amendment provides that no person "be subject for the same offense to be twice put in jeopardy of life or limb." This Court has held that there are three separate guarantees embodied within the Double Jeopardy Clause: (1) protection against reprosecution for the same offense following an acquittal; (2) protection against reprosecution for the same offense following a conviction; and (3) protection against multiple punishments for the same offense. Albernaz vs. United States, 450 U.S. 333, 343, 101 S. Ct. 1137, 1144-45, 67 L.Ed.2d 275; Illinois vs. Vitale, 447 U. S. 410, 415, 100 S.Ct. 2260,

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(continued) "In order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment of the greater. If a conviction might have been had, and was not, there was an implied acquittal." 9 S.Ct. at 676-677

2264, 65 L.Ed.2d 228 (1980); North Carolina vs. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L. Ed.2d 656 (1969). The second and third guarantees protect the individual against multiple punishments for what is in reality but a single offense. The first guarantee protects the individual from being subjected to a series of prosecutions for a single offense. One of the better statements of the historical and social policy embodied in the concept of double jeopardy is in Comment, 65 Yale L.J.339, 341 (1956) which reads as follows:

> "The prohibition against double jeopardy found in the federal and most state constitutions represents two distinct policies: that no person should be punished more than once for the same offense, and that no one should be harassed by successive prosecutions for a single wrongful act or activity. The ban on multiple punishment imposes a limitation on judicial interpretation of substantive criminal law. It forbids penalizing an accused more severely than the law provides, through the device of finding that he has committed several violations of substantive law where only one exists. The restriction on multiple prosecutions, on the other hand, is designed to implement several procedural objectives. One of these is protection of both the defendant and the public from the expense of prolonged and unnecessary litigation due to the retrial of previously adjudicated issues, or to the use of several proceedings to try questions of fact and law that logically make up a single case. Another objective is to safeguard the accused from the excessive harassment and stigma of repeated criminal prosecutions. Furthermore, once acquitted or convicted of a crime for his conduct in a particular transaction, a defendant should be able to consider the matter closed and plan his life ahead without the threat of subsequent prosecution and possible imprisonment for the same conduct. These three principal objectives - time and money, avoidance of unnecessary harassment and stigma, and psychological security - are expressed in the maxim that no one shall be twice vexed for the same cause."

The central issue in this case is that aspect of the Double Jeopardy Clause which prohibits successive prosecutions, what

this Court has sometimes referred to as the valued right of the defendant to have his trial completed by a particular tribunal. Arizona vs. Washington, 434 U.S.497, 503, 98 S.Ct. 824, 829, 54 L. Ed.2d 717 (1978); Illinois vs. Somerville, 410 U. S. 458, 466, 93 S.Ct. 1066, 1071, 35 L. Ed.2d 425 (1973).

As previously noted, Respondent was indicted, tried and convicted for the greater offense of aggravated rape. During that trial Respondent requested that the jury be instructed on the lesser included offense of rape. (R. 206) The trial court denied the requested instruction and the jury was not provided with that verdict option. Respondent's conviction was subsequently reversed for insufficient evidence as to only the aggravating element of the offense. The State subsequently indicted Respondent for the offense of rape. Respondent interposed the defense of double jeopardy and the appellate courts agreed that his subsequent prosecution for the lesser offense was prohibited by the Double Jeopardy Clause. Thus, the decision below was concerned only with the question of whether the acquittal of the greater offense was a bar to further prosecution for the lesser offense when the accused has affirmatively attempted to have the issue of the lesser offense resolved in the first trial. The decision below did not attempt to answer the question of whether the Double Jeopardy Clause would bar a subsequent prosecution if the jury instructions had included a charge on a lesser offense or if the State had

requested the inclusion of a lesser offense and the trial court had erroneously refused such an instruction.[8]

Among the guarantees recognized in the Double Jeopardy Clause is the protection against reprosecution for the same offense following an acquittal. In Ball vs. United States, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), the defendant was indicted but acquitted for the offense of murder. A second indictment was subsequently returned for the same murder. The Court noted that the protection afforded by the Double Jeopardy Clause "is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." (emphasis supplied) Ball, 16 S.Ct. at 1194. The author also observed that "(h)owever it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense." Ball, 16 S.Ct. at 1195.

In Tibbs vs. Florida, this Court explained the importance of the prohibition against successive prosecution. The Court observed as follows:

> "First, the Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial. A reversal based on the insufficiency of the evidence has the same effect because it remains that no rational fact finder could have voted to convict the defendant.
>
> "Second, Burks and Greene implement the principle that '(t)he Double Jeopardy Clause forbids a second trial

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[8] Stephens, 806 S.W.2d at 814 n. 4

> for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' Burks, supra., at 11. This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance. See Green vs. United States, 355 U.S. 184, 187-188 (1957); United States vs. DiFrancesco, 449 U.S., at 130. For this reason, when a reversal rests upon the ground that the prosecution has failed to produce sufficient evidence to prove its case, the Double Jeopardy Clause then bars the prosecutor from making a second attempt at conviction."

457 U.S. 31, 41-42, 102 S.Ct. 2211, 2218, 72 L.Ed.2d 652 (1982).

The State has broad discretion on how it charges a defendant with violations of the law including the power to select the charges to be brought in a particular case. Ball vs. United States 470 U.S. 856, 859, 105 S.Ct. 1668, 1670, 84 L.Ed.2d 740 (1985). The Double Jeopardy Clause does not prohibit the State from prosecuting the defendant for such multiple offenses in a single prosecution. Ohio vs. Johnson, 467 U.S. 497, 500, 104 S.Ct. 2536, 2541, 81 L.Ed.2d 425 (1984); United States vs. Gaddis, 424 U.S. 544, 96 S.Ct. 1023, 47 L.Ed.2d 222 (1976). Further, the State may accuse and prosecute the defendant with greater and lesser offenses in a single proceeding even though the defendant could, in the end, be convicted of but a single offense. Johnson, 467 U.S. at 500, 104 S.Ct. at 2541 and Gaddis, 424 U.S. at 550, 96 S.Ct. at 1027.

In addition to the right to initially charge the defendant with multiple offenses which have been committed in a single criminal action the State has the right to seek conviction of a lesser offense upon an indictment for the greater only. This

rule was originally developed as a benefit to the government and to aid them in cases in which the proof may fail to establish some element of the greater offense charged but would establish guilt of the lesser offense. See Wright, Federal Practice and Procedure, Section 515, note 54. The defendant of course has an equal right to seek the submission of a lesser included offense in the instructions to the jury if such be beneficial to him. As has been observed, "(a)lthough the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged, it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble vs. United States, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973). In addition, the state courts that have addressed this issue have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it. See Beck vs. Alabama, 447 U.S. 625, 636, n. 12, 100 S.Ct. 2382, 2389, n. 12, 65 L.Ed.2d 932 (1980).

In the instant cause the State chose to indict Respondent initially for the greater offense only, although Texas law would have permitted a multi count indictment alleging both greater and lesser offenses.[9] The State did not request that the trial court

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[9] TEX. CODE CRIM. PROC. ANN., art. 21.24(b); Washington vs. State, 771 S.W.2d 537, 546 (Tex. Crim. App. 1989)

instruct the jury on the lesser included offense.[10] Respondent did request that the lesser included offense be submitted, but such request was denied by the trial court. Clearly, it was Respondent's intent to have all possible issues submitted to the jury rather than subject himself to piecemeal prosecution. The State was content to allow submission of the greater offense only to the jury.

It may be argued that Respondent would have been better suited to decide not to request the lesser included instruction, hoping for a verdict of acquittal where the evidence was insufficient to prove the aggravating element but sufficient to prove the lesser included offense of rape. Yet, as this Court has noted, such a course of action may not be in a defendant's best interest:

> "It is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction - in this context or any other - precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve the doubts in favor of a conviction.

Keeble, 412 U.S. at 212-213. When the evidence unquestionably establishes that the defendant is guilty of a serious violent

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[10] The State has the right to request an instruction on lesser included offenses. TEX. CODE CRIM. PROC. ANN. art. 36.15; Stephens, 806 S.W.2d at 818.

offense but there is some doubt with respect to the quality of evidence that might justify the conviction for a greater offense but not the lesser, the failure to give the jury the option of convicting for the lesser would seem to enhance the risk of an unwarranted conviction for the greater offense.

As was stated by one United States Court of Appeals, "To permit the government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the government from the extensive catalog of crimes furnished to it in the Criminal Code, would permit the very abuse that led English judges to develop the rule against Double Jeopardy long before it was enshrined in the Fifth Amendment." United States vs. Cramer, 289 F.2d 909, 916 (2nd Cir. 1961). This Court has held that one of the policy considerations underlying the Double Jeopardy Clause is the prohibition against successive prosecutions:

> "The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Green vs. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223 (1957). On balance then it was in Respondent's best interest to have the lesser included offense provided as a verdict option so that he could not then be subjected to a second prosecution for the lesser offense and because such would lessen the risk of the

improper conviction for the offense of aggravated rape rather than the lesser offense of rape.[11]

Petitioner argues that the Double Jeopardy Clause should not prohibit it from seeking further prosecution of Respondent for a lesser included offense after acquittal on the greater, even though such was not charged in the indictment nor submitted to the jury as a verdict option. If Petitioner is correct that the Double Jeopardy Clause does not prohibit such successive prosecutions then Respondent may be forced to run the gauntlet not merely twice (trial for aggravated rape and rape) but may be forced, depending upon the evidence and defenses presented, to run the gauntlet six times. Under Texas law, either case made or by statute, it has been held that five offenses are included within the charge of aggravated rape: attempted aggravated rape,[12] rape,[13] attempted rape,[14] aggravated assault,[15] or indecency with a child.[16] The protection afforded by the Double Jeopardy Clause against successive prosecutions for the same offense would be eviscerated if Petitioner is granted the right

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[11] Aggravated rape is a first degree felony offense with a punishment range of not less than five nor more than 99 years or life confinement. TEX. PENAL CODE ANN. secs. 21.03(c) and 12.32. Rape is a second degree felony with a punishment range of not less than 2 nor more than 20 years confinement. TEX. PENAL CODE ANN. secs. 21.02(c) and 12.33.

[12] Simmonds vs. State, 645 S.W.2d 652 (Tex. App. - Ft. Worth 1983); TEX. PENAL CODE ANN. sec. 15.01; TEX. CODE CRIM. PROC. ANN. art. 37.09(4).

[13] McGahey vs. State, 744 S.W.2d 695, 696 (Tex. App. - Ft. Worth 1988).

[14] TEX. PENAL CODE ANN. sec. 15.01; TEX. CODE CRIM. PROC. ANN. art. 37.09(4).

[15] Bryant vs. State, 705 S.W.2d 745, 747 (Tex. App. - Houston [1st] 1986).

[16] Cunningham vs. State, 726 S.W.2d 151 (Tex. Crim. App. 1987).

of successive prosecution for lesser offenses after acquittal for the greater.

In Jeffers vs. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977) the defendant affirmatively opposed the Government's motion to consolidate two related indictments. This Court held that the defendant had therefore waived any double jeopardy claim. The Court observed:

> "(T)he considerations relating to the propriety of a second trial obviously would be different if any action by the government contributed to the separate prosecutions on the lesser and greater charges. No hint of that is present in the case before us, since the government affirmatively sought trial on the two indictments together."

432 U.S. at 152-53, n. 20, 97 S.Ct. at 2217, n. 20. In the instant cause the State did not obtain an indictment for both the greater and lesser offenses nor did it request an instruction on both offenses. Respondent did make such a request. If Respondent does have a right to be free from successive prosecutions it cannot be said that he in any way waived such a right.

The two cases cited by Petitioner in support of its position that decisions of this Honorable Court have established that the Double Jeopardy Clause does not prohibit reprosecution of Respondent herein are clearly distinguishable. In Price vs. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) the defendant was charged with the offense of murder but convicted of the lesser offense of voluntary manslaughter. His conviction was subsequently reversed for trial error. The defendant was again tried for the offense of murder, over objection that he had

already been acquitted of that charge, and again convicted of voluntary manslaughter. This Court held that double jeopardy provisions prohibited retrial for the offense of murder but not a trial for the offense of voluntary manslaughter under the doctrine of continuing jeopardy. Thus this decision resolves issues not relevant in the instant cause.

The second case cited by Petitioner is Morris vs. Matthews, 475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986). In that case the defendant was first convicted of the offense of robbery. Subsequently, after the trial court denied the pre-trial motion to dismiss on jeopardy grounds, the defendant was convicted of aggravated murder where the robbery incident was an element of the aggravated murder charge. The Ohio appellate court held that the Double Jeopardy Clause prohibited trial on the aggravated murder charge but, as permitted by Ohio law, modified the conviction to that of the lesser included offense of murder.[17] This Court held that the Double Jeopardy Clause had been violated by the second trial for aggravated murder since the defendant had already been convicted of an offense which was a constituent element of the greater. Since Ohio law permitted modification of the conviction to the lesser offense, and the jury must necessarily have found the evidence sufficient to prove the murder since it convicted of the greater offense and thus of the lesser, the remedy of the modification of the judgment was

[17] The Respondent therein conceded that the Double Jeopardy Clause would not have prohibited the State from trying him for murder since that offense and the prior conviction for robbery were independent crimes, neither being a lesser included of the other. 475 U.S. at 244; 106 S.Ct. at 1037.

sufficient to cure the harm of the jeopardy violation. In so ruling the Court observed:

> "After all, one of the purposes of the Double Jeopardy Clause is to prevent multiple prosecutions and to protect an individual from suffering the embarrassment, anxiety and expense of another trial for the same offense."

475 U.S. at 247; 106 S.Ct. at 1038. Thus the modification remedy was approved, at least in part, because the defendant would thereby not be subject to successive prosecutions.

The Court in Price found no jeopardy violation in that the defendant was in a continuing state of jeopardy because his appeal brought about the reversal of his conviction for the lesser offense. The Court in Morris found no jeopardy violation because under Ohio law the defendant's conviction for the greater offense could be modified to a conviction for a lesser offense thus preventing a second prosecution. Neither case is dispositive of the issues herein.

The Double Jeopardy Clause bars retrial for the "same" offense upon conviction or acquittal in a trial court. Brown vs. Ohio, 423 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). In Blockburger vs. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) this Court established the test for determining whether statutorily defined offenses are the same for double jeopardy purposes. The Supreme Court held:

> "The applicable rule is where the same act or transaction constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not."

299 U.S. at 304, 52 S.Ct. 182. In the instant cause the offense of rape is a lesser included offense of aggravated rape. As is invariably true of greater and lesser included offenses, the lesser requires no proof beyond that of the greater and they are therefore the same offense for jeopardy purposes. Conviction or acquittal of the greater precludes prosecution of the lesser because they are the same offense. Brown, 432 U.S. at 168. To permit the State to freely subject its citizens to a second trial for the same offense would arm the government with a potent weapon of oppression. United States vs. Martin Linnen Supply Company, 430 U.S. 564, 569, 97 S.Ct. 1349, 1353, 51 L.Ed.2d 642 (1977). The Double Jeopardy Clause therefore prohibits the second prosecution after guilt or innocence has been determined in the first prosecution.

In the instant cause Petitioner seeks the right to reprosecute Respondent for a lesser offense after a finding on appeal of insufficient evidence to support conviction of the greater. For double jeopardy purposes they are the same offense. Blockburger, supra. All prior decisions of this Court make it clear that upon conviction or acquittal in a trial court the Double Jeopardy Clause bars retrial for the "same" offense. Brown, 432 U.S. at 165, 97 S.Ct. at 2225; Cf.Bullington vs. Missouri, 451 U.S. 430, 442, 101 S.Ct. 1852, 68 L.Ed. 270(1980) ; Cf.Burks vs. United States, 437 U.S.1, 16, 98 S.Ct. 2141, 2149-50, 57 L.Ed.2d 1 (1978); Cf.Greene vs. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 2015 (1978). The Double Jeopardy Clause prohibits successive prosecution for the same offense. The

Constitution does not permit Petitioner the right it seeks. The Petition for Writ of Certiorari should be denied.

II.

THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT

Petitioner asserts that every other court to consider an issue similar to the case at bar has found no violation of the Double Jeopardy Clause. Contrary to this assertion Respondent has discovered that every appellate court which has ruled upon this issue has held that acquittal on a greater offense bars further prosecution on a lesser offense unless the lesser offense was submitted to the trier of fact as a verdict option.

A.

STATE CASES

Each of the three cases cited by Petitioner are concerned with double jeopardy issues not relevant herein. In each case the fact finder first acquitted on a greater offense and then deadlocked on lesser offenses. Thus in each case the defendant was in a continuing state of jeopardy so that a retrial would not subject them to successive prosecutions. In the instant case the jury did not deadlock on an included offense since this verdict option was not provided in the written instructions even though such was requested by Respondent. Since Respondent was not in a continuing state of jeopardy, reprosecution of Respondent after entry of acquittal pursuant to appellate reversal is clearly prohibited by the Double Jeopardy Clause.

In State vs. Seagroves, 691 S.W.2d 537 (Tenn. 1985) the defendant was acquitted of the offense of armed robbery but the jury deadlocked on a lesser offense submitted to them. A mistrial was declared as to the lesser offense and the reviewing court held that the defendant was subject to retrial on the lesser offense only. In People vs. Mayo, 397 N. E.2d 1166 (N. Y. 1979) the defendant was indicted for the offense of first degree robbery but this count was withdrawn from consideration (the equivalent of an acquittal for that offense) and the jury was instructed that they could only consider two lesser offenses - second or third degree robbery. A mistrial was subsequently declared when the jury could not reach a verdict. The reviewing court permitted retrial as to the lesser offense only.[18]

In Stone vs. Superior Court of San Diego, 646 P. 2d 809 (Cal. 1982) the defendant was indicted for murder but the jury was instructed on first and second degree murder as well as voluntary and involuntary manslaughter. A mistrial was declared after the jury deadlocked on the lesser included offenses. The reviewing court noted that prior state precedent held that

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[18] See People vs. Ballard, 562 N.Y.2d 271 (A.D. 4 Dept. 1990) The defendant therein was indicted for two counts of muder but found guilty of two counts of manslaughter. Both convictions were reversed for trial error and the defendant was reprosecuted under the original murder indictment. The two subsequent convictions for manslaughter were also reversed. The author thereafter noted that the "court is divided on the issue whether further prosecution of defendant under a new indictment charging manslaughter in the first degree is barred by double jeopardy (compare People vs. Mayo, supra., at 253, 422 N.Y.2d 361, 397 N.E.2d 1166 with United States vs. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300) We are unanimous in our view that, under the circumstances, in the exercise of our discretion, in the interest of justice, we would not uphold a conviction for that crime." 562 N.Y.2d at 271.

acquittal of a greater offense would not bar retrial for any lesser offenses as to which the jury was deadlocked if the lesser offense had been charged in a separate count in the pleading instrument. In Stone, the defendant had only been accused of the greater offense in a single count. 646 P.2d at 821. The trial judge determined that although the jury was unanimous that the defendant was not guilty of two of the greater offenses they were deadlocked on several lesser offenses. 646 P.2d at 813. The trial court subsequently refused to accept a partial verdict of acquittal on the two offenses because California procedure did not permit such action. Mistrial was later declared.

The California Supreme Court held that the jury's verdict of acquittal on the greater offense should have been accepted with a mistrial declared as to the lesser included offenses which could thereafter be reprosecuted. The California rule that permitted reprosecution for lesser offenses after acquittal of the greater when both had been charged in a multi-count indictment was made applicable when the same events occurred but the indictment had pled the greater offense only.

However in another portion of the opinion the court acknowledged that the California Penal Code, Sec. 1023, prohibits a second prosecution for an offense charged or for an offense included therein after acquittal on the greater offense. 646 P.2d 820-1. The court wrote as follows:

> "That language, we believe, envisions the situation in which a jury acquits a defendant of the greater offense yet remains silent as to the latter. In that event, it would be unfair to subject the defendant to another trial . . . Sec. 1023 may also have been directed to

> preventing a prosecutor from charging only the single, greater offense, and then, after failing to obtain a conviction on that charge, subsequently trying the defendant on each of the lesser included offenses in succession until finally obtaining a conviction. Under modern procedures of course, there is no longer a possibility of such vindictive multiple prosecutions."

646 P.2d at 821.

Clearly these decisions are not of value in determining the propriety of the decision rendered by the Texas Court of Criminal Appeals since they are each factually distinguishable. In this case Respondent was indicted only for the offense of Aggravated Rape and the jury was permitted only to consider a verdict on that offense and no other. Other appellate courts which have considered double jeopardy implications to an attempted retrial of a lesser offense not submitted to the factfinder during the trial which resulted in an acquittal of a greater offense have uniformly held that subsequent prosecution of the lesser offense is barred.

In State vs. Lonergran, 566 A. 2d 677 (Conn. 1989) the defendant was initially charged with driving while intoxicated. A victim of the accident occasioned by the incident later died and the defendant was thereafter charged with manslaughter with a motor vehicle while drunk. Although the pleading instrument contained both offenses, the case went to trial on the more serious offense only pursuant to election by the state. A judgment of acquittal was entered after trial before the court because the evidence failed to prove that intoxication was a cause of death. The state then sought to reprosecute for the related offense of D.W.I. The court held that reprosecution was

not barred under the Blockburger test in that each offense contained an element that the other did not, but was barred under the "same evidence" test of Illinois vs. Vitale for violation of the Double Jeopardy Clause. The court held that a second prosecution is barred if evidence offered to prove the first offense is the sole evidence available to prove the second. Even though the prior prosecution for the greater offense resulted in an acquittal the second prosecution for the lesser offense was barred by double jeopardy.

In State vs. Dunbar, 318 S. E. 2d 16 (S.C. 1984) the defendant was charged and convicted of the greater offense of house breaking. On appeal the evidence was held to be insufficient and entry of a judgment of acquittal was ordered. The appellate court noted that although the defendant could have been initially charged with the lesser included offense of entering a house without breaking, double jeopardy would now preclude reindictment and reprosecution as this crime was a lesser included of housebreaking.

A California appellate court recognized that reprosecution for a lesser offense after acquittal of the greater where the information charges only the greater offense and the question of the lesser included offense is not submitted to the jury is barred by double jeopardy provisions. "(I)n those cases an acquittal of the greater offense not only bars subsequent prosecution but also constitutes an acquittal of the lesser included offenses." People vs. Garcia, 212 Cal. Rptr. 822,828 (Cal. App. 2d Dist. (1985). An Illinois appellate court has held

that "(w)hen a defendant is indicted for, and tried on, the greater offense, and the trier of fact acquits him of that offense while remaining silent as to all lesser included offenses, the acquittal operates as a bar to subsequent prosecution of any of the lesser offenses." People vs. Regan, 444 N.E.2d 742, 746-7 (Ill. App. 3rd Dist. 1982).[19] Two Missouri appellate courts have held that an acquittal on a greater offense in one trial, by reason of double jeopardy, bars a subsequent prosecution for a lesser included offense in a subsequent trial. State vs. O'Dell, 184 S.W.2d 453 (Mo. App. S.D. 1985); State vs. Johnson, 710 S.W.2d 908 (Mo. App. N.D. 1986). In Johnson the author noted that "Missouri long ago adopted Wharton's Rule that acquittal on a greater offense is a bar to a later prosecution on a minor offense included in the greater offense if under the charge of the greater offense the defendant could have been convicted of the lesser." 710 S.W.2d at 911-912. In accord with these rulings are decisions of the following state appellate courts: State vs. Calvacca, 489 A.2d 1199, 1201-02 (N.J. Super. A.D. 1985); State vs. Morning, 664 P.2d 857 (Kans. 1980); State vs. Thomkins, 403 S.W.2d 644 (La. 1981);[20] Bennet vs. State, 182 A.2d 815 (Ct. App. Md. 1962); State vs. Birckhead, 124 S.E.2d 838 (N.C. 1962). In the latter

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19 See ILL. REV. STAT. (1981) Ch. 38, par. 3-4(b)(1) Committee Comments, p. 127:

> "For example, a former conviction or acquittal of murder would bar a subsequent prosecution for manslaughter, assault with intent to murder (People vs. Dugas, 310 Ill. 291, 141 N.E. 769 [1933]) or assault and battery, based on the same conduct with respect to the same victim. . ."

20 2 L.S.A. C.Cr.P. art. 596

jurisdiction the author quoted approvingly from Wharton's Criminal Law and Procedure (1957) where the following is contained:

> "...(I)f a man be acquit generally upon an indictment of murder, auterfoits acquit is a good plea to an indictment of manslaughter of the same person, or e converso, if he be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree and the fact is the same."

2 Hale P. C. 246. See also Chitty's Blackstone, 19th London Ed. Book IV, p. 336. 124 S.E.2d at 841.

A survey of the relevant applicable state court decisions establishes that each court would have reached the same result as did the Texas Court of Criminal Appeals. Acquittal of a greater offense bars further prosecution of the lesser offense when the lesser offense was not but could and should have been submitted as a verdict alternative in the initial trial. Whether the accused is guilty of either greater or lesser offenses must be resolved in a single trial since the Double Jeopardy Clause prohibits successive prosecutions of the same offense.

B.

FEDERAL CASES

The three federal appellate court decisions cited by Petitioner are factually distinguishable from the events of the instant cause. They therefore do not support Petitioner's argument that the successive prosecution of Respondent is not barred by the Double Jeopardy Clause. Other decisions of United States Courts of Appeals indicate that such provision does bar further prosecution of Respondent.

The first case cited by Petitioner is Beverly vs. Jones, 854 F.2d 412 (5th Cir. 1988). In that case the defendant was initially indicted for the capital offense of "robbery when a victim is intentionally killed." The Alabama Court of Criminal Appeals reversed and remanded that conviction because the trial court erroneously failed to instruct the jury on lesser included offenses. The defendant was reindicted and retried for capital murder with the jury being properly instructed on lesser offenses. This conviction was reversed in that the evidence was insufficient to establish the robbery element of capital murder. The defendant was then indicted and convicted for the lesser offense of murder.

The federal court ruled that the Double Jeopardy Clause did not prohibit the second prosecution for the lesser offense of murder since Alabama law would have allowed the state appellate court to reform the judgment on the original conviction for capital murder after a finding of insufficiency on the aggravating element to allow a judgment of guilt on the lesser offense of murder with a remand for sentencing. Thus, in Alabama the defendant is in a continuing state of jeopardy when the jury is instructed on greater and lesser offenses. The Court of Appeals correctly noted that it would be "difficult to imagine . . . how Beverly's second chance at acquittal could be constitutionally infirm when a remand for sentencing would not have been." 854 F.2d at 415-16.

In the instant cause Respondent was not in a continuing state of jeopardy. The indictment did not charge him with a

lesser offense as well as the greater. The jury was not instructed as to a verdict option on the lesser offense. The Court of Criminal Appeals does not have the power under Texas law to reform a judgment for a greater offense after a determination of insufficiency of evidence and enter judgment for a lesser offense and thereafter remand for sentencing. If Respondent is forced to face the second accusation for the lesser offense he will thus be required to endure the gauntlet of a second prosecution. Beverly, on the other hand was in a continuing state of jeopardy and therefore not required to face successive prosecutions.

The second case cited by Petitioner, Clark vs. Maggio, 737 F.2d 471 (5th Cir. 1984) did not involve double jeopardy issues. In that case the defendant was indicted and convicted of capital murder and sentenced to death. While the case was pending the Louisiana death penalty law was declared unconstitutional. The conviction was affirmed but remanded for sentencing. In his Writ of Habeas Corpus Clark contended that the evidence was insufficient to prove the aggravating element of the offense of capital murder and the appellate court agreed. After determining that Clark had been denied due process since guilt was not proven beyond a reasonable doubt, the court next considered whether this violation was harmful to Clark. The court noted that the jury that convicted Clark had been instructed on the greater offense as well as all lesser offenses. 737 F.2d 474. Thus had the trial court properly performed its function, it would have directed a verdict of acquittal on capital murder and submitted

to the jury only the included offenses. Since Clark would have received the same sentence in that situation as he did after reversal (because of the unconstitutionality of Louisiana's death penalty statute) he was not prejudiced by the Due Process violation. Since this case does not speak to the issue of successive prosecutions, nor any other aspect of double jeopardy protections, it is not authority for Petitioner's claim that this decision conflicts with that of the Texas Court of Criminal Appeals.

The last federal case cited by Petitioner is Tapp vs. Lucas, 658 F.2d 383 (5th Cir. 1981). In that case the defendant was indicted for murder but found guilty of manslaughter. The case was reversed by the Mississippi Supreme Court for trial error. Tapp was reindicted and convicted for murder. The State appellate court agreed that double jeopardy barred the second prosecution for murder since the first jury had acquitted him of that charge prior to convicting him of manslaughter. In fashioning a remedy the Mississippi Supreme Court affirmed the conviction for murder but remanded for sentencing under the range applicable for manslaughter.

Two double jeopardy issues were resolved in Tapp. First, the court held that the determination by the state court that Tapp's first reversal was for trial error and not sufficiency was conclusive as to the federal court and thus a second trial was not jeopardy barred although conviction for murder was since the first jury had acquitted him of that charge. Second, the state court affirmance of the second prosecution with a remand for

sentencing limited to the punishment range for manslaughter "was a common sense solution to the problem of avoiding yet another trial for prosecution and defense." 658 F.2d at 386 . This opinion does not rule on or even discuss an issue remotely similar to that raised in this Petition.

Petitioner also cites to United States vs. Gooday, 714 F.2d 80 (9th Cir. 1983) for the proposition that when a jury acquits on a greater offense but is deadlocked on one or more lesser offenses, retrial of the lesser offense poses no double jeopardy concerns.[21] While this is an accurate rendition of the decision in this case, Petitioner fails to note that other comments in the opinion indicate that in a situation similar to which occurred in the instant cause that the court would have ruled that Gooday would not be subject to successive prosecutions.

The Court's holding in Gooday was limited to a determination that an acquittal on the indictment's first degree murder count would not preclude retrial on the three lesser included offenses on which the jury was instructed and deadlocked. However, the Court also noted that a different result would be required if the jury had been instructed on the greater offense only and not the lesser offenses:

> "If no instructions are given on lesser included offenses, the jury's verdict is limited to whether the defendant committed the crime explicitly charged in the indictment. In such cases an acquittal on the crime

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21 Gooday was tried under a one count indictment for murder. Pursuant to his request the jury was instructed on three lesser offenses. The jury acquitted on murder but could not render a verdict on the lesser offenses. Mistrial was declared and the case was reset for trial on the lesser offenses. Gooday moved to dismiss on double jeopardy grounds. 714 F.2d at 81.

> explicitly charged necessarily implies an acquittal on all lesser offenses included within that charge. In Re Neilsen, 131 U.S. 176, 189-190, 9 S.Ct. 672, 676-677, 33 L.Ed. 118 (1889). An acquittal on the explicit charge therefore bars indictment on the implicit lesser included offenses."

714 F.2d at 82.

Several United States Courts of Appeals have held that the Double Jeopardy Clause prohibits successive prosecution of lesser offenses after conviction or acquittal of greater offenses. In United States vs. Ragins, 840 F.2d 1184 (4th Cir. 1988) the Court held that the following rule applies when a plea of double jeopardy is made to prohibit successive prosecutions:

> "(D)ouble jeopardy serves the additional purpose of providing criminal defendants with a measure of finality and repose. (Citations omitted) In this aspect, double jeopardy guarantees that an accused who has once stood the ordeal of criminal prosecution through to judgment - whether conviction or acquittal - shall not be required to 'run the gauntlet' of trial again for the same alleged misconduct. (citations omitted) Given the multiplicity of offenses that may arise from a single transaction, the formalistic Blockburger test, with its narrow focus on the technical elements of the offense charged, is inadequate to vindicate this constitutional guarantee against retrial. The general test for determining whether successive prosecution involve the 'same offense' is therefore a more flexible and pragmatic one, which focuses not on the formal elements of the two offenses, but rather on the proof actually utilized to establish them. Under this 'same evidence' test, the second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged." (emphasis supplied)

840 F.2d at 1188.

In Mars vs. Mounts, 895 F.2d 1348 (11th Cir. 1990) the defendant was first indicted in Florida for first degree murder. On its own motion the state filed a Bill of Particulars which restricted the possible time frame for the commission of the

offense. The jury was instructed on this offense as well as the lesser offense of second degree murder. The jury returned a general verdict of acquittal. Thereafter the State reindicted for second degree murder of the same individual on the same date at a different time. The State conceded that the second degree murder was a lesser included offense of the first degree murder charge. Thus for double jeopardy purposes they were the same offense. 895 F.2d at 1358. In ruling on Mars jeopardy claim the court held that under the Blockburger "same offense" test the prosecution for the second degree murder offense after acquittal of the first degree murder charge was barred by double jeopardy. The court held that since "the State would have to rely on the same 'incidents' of which Mars was acquitted in the original trial to prove its second-degree murder case" the second prosecution was jeopardy barred. 895 F.2d at 1359.

In Wang vs. Withworth, 811 F.2d 952 (6th Cir. 1987) the defendant was indicted in both the first and second trial on grand theft under an enhanced felony statute. In the first trial the judge granted a Motion for New Trial in that there was no evidence that the prior conviction used for enhancement had been obtained while Wang was represented by counsel. The first trial ended in a mistrial. In the second trial Wang's plea of double jeopardy was denied and he was found guilty of the lesser included offense of misdemeanor theft. The Court of Appeals in ruling on Wang's jeopardy claim first ruled that although the trial court had called its action a grant of a Motion for Mistrial, such was actually an acquittal on the felony for

insufficiency of proof of the enhancement element. The protections afforded by the Double Jeopardy Clause were implicated where the state's case has failed due to legal insufficiency of the evidence:

> "Under those circumstances (where the State's case failed due to legal insufficiency of the evidence) the prosecution has already been given a fair opportunity to offer whatever proof it could assemble. If the opportunity is lost, the Double Jeopardy Clause prevents the prosecution from obtaining a second 'bite at the apple'".

811 F.2d at 957. Thus the termination of the first trial by acquittal of the greater offense barred Wang's subsequent conviction for the included offense. The court observed:

> "The Double Jeopardy Clause was designed to protect an individual as much from the hazardous intention of a second criminal prosecution as from actual conviction and imprisonment."

811 F.2d at 958.

In United States vs. Middleton, 673 F.2d 31 (1st Cir. 1982) the defendant was originally indicted in the Southern District of Florida. Count VI of that indictment charged a continuing criminal enterprise. The next year the defendant was indicted in the District of Maine on various drug counts. He was later reindicted in Florida and the continuing criminal enterprise allegation, Count VI, was expanded to cover evidence of the Maine violations. Therefore the Maine offense became a lesser included offense since it would be used to prove the continuing criminal enterprise count. The trial court dismissed Count VI which was the equivalent of an acquittal. In reviewing the jeopardy claim as to the government's attempt at prosecution on the Maine

indictment, the court ruled that "a defendant convicted or acquitted of a crime which includes several essential elements as Section 848 does, may not be tried subsequently for a lesser included offense." 673 F.2d. at 33. Thus Middelton's prior acquittal on the greater offense barred further prosecution on the included offense.

In United States vs. LoRusso, 695 F.2d 45 (2nd Cir. 1982) the defendant was charged with a multi-count indictment. After the close of testimony the trial court granted orally a Motion for Judgment of Acquittal. In response to this action of the trial court the Government requested the submission of a lesser included offense. The trial court permitted this submission since the judgment of acquittal had not been formally entered. The Court of Appeals held that the trial court had the power to reconsider the orally announced judgment of acquittal and submit the lesser included offense. However the court ruled that had the acquittal of the greater offense been formally entered the government would have been precluded from seeking a subsequent prosecution for the lesser included offense. 695 F.2d at 54. The court ruled that entry of a judgment of acquittal for insufficiency of evidence terminates the prosecution on that charge and bars retrial of the defendant on that or any lesser included charge.

The relevant decisions of the various United States Courts of Appeals hold that acquittal on a greater offense precludes successive prosecution on lesser offenses as such would violate the Double Jeopardy Clause. The decision of the Texas Court of

Criminal Appeals does not conflict with either these decisions or those of state appellate courts. The Petition for Writ of Certiorari should be denied.

III.

THE DESICION OF THE COURT BELOW CAN BE SUPPORTED BY THE "SAME CONDUCT RULE" OF GRADY VS. CORBIN

Petitioner notes that the Court of Criminal Appeals did not rely on the decision of this Court in Grady vs. Corbin, 495 U.S. ___, 110 S.Ct. 2084 (1990) in support of the decision rendered. Petitioner anticipates that Respondent will urge this decision as an alternative basis for affirmance of the decision below. In response to this claim Respondent asserts that the holding in Grady vs. Corbin is inapplicable to the pending cause but that if it were applicable it would support the decision of the Texas Court of Criminal Appeals.

In Grady the Court observed:

> "(T)o determine whether a subsequent prosecution is barred by the Double Jeopardy Clause, a court must first apply the traditional Blockburger test. If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred."

Grady, 110 S.Ct. at 2090. Under Texas law the offense of rape is lesser included to the offense of aggravated rape. Thus, the traditional Blockburger test is all that is necessary to determine whether the two offenses under consideration herein are the same for double jeopardy purposes and it is not necessary to reach the "same conduct" test as adopted in Grady, supra.

Petitioner also contends that both Grady and Blockburger apply only to situations in which the first trial resulted in a conviction. However, this Court has made clear that both tests apply regardless of whether the prior prosecution resulted in an acquittal or conviction.

It is true that the Blockburger test was developed "in the context of multiple punishments imposed in a single prosecution," Grady, 110 S.Ct. at 2091. However both the Blockburger test and the Grady test apply when double jeopardy considerations include determination of whether the accused is being subjected to successive prosecutions whether following acquittal or conviction. The Court in Grady noted that because of independent concerns about successive prosecutions that it has "not relied exclusively on the Blockburger test to vindicate the Double Jeopardy Clause as protection against multiple prosecutions." 110 S.Ct. at 2062.

Even if the Grady test is applicable to the instant cause the rationale contained therein would support the decision of the Texas Court of Criminal Appeals. As Grady makes clear, the provision of the Double Jeopardy Clause which bars successive prosecutions is not dependent solely on an "actual evidence" test or a "same evidence" test. The critical inquiry is what conduct the State will prove. If the conduct to be used in the second prosecution is the same as was used in the first the Double Jeopardy Clause prohibits the second prosecution from occurring. In Grady this Court consistently refers to prior "prosecutions" thus indicating that whether the prior prosecution ended in

acquittal or conviction a second prosecution for the same conduct is prohibited. Thus both the Blockburger test and the Grady "same conduct" test exist to protect against multiple prosecutions whether following acquittal or conviction. At least one United States Court of Appeals has so held.

In United States vs. Calderon, 917 F.2d 717 (2nd Cir. 1990) the defendant was initially indicted on a wide ranging multi-drug conspiracy lasting an extended period of time. During the trial of that cause the trial court held that the evidence of the defendant's participation in the conspiracy was not proven and thereafter issued a judgment of acquittal. The government then sought a new indictment on a smaller conspiracy for a single drug which lasted a shorter period of time but essentially alleged the same conduct for which the defendant had been unsuccessfully prosecuted.

In reviewing the double jeopardy claim the appellate court held that after Grady vs. Corbin the "same conduct test" and not the Blockburger test should be used to resolve all double jeopardy complaints concerning successive prosecution cases. 917 F.2d at 721. Thereafter the court ruled that the acquittal on the greater offense precluded a subsequent prosecution for a smaller included offense as such was barred by the Double Jeopardy Clause. Thus, contrary to Petitioner's assertion, the Grady "same conduct" rule does prohibit a second prosecution for a lesser offense after acquittal of the greater.

CONCLUSION

For the foregoing reasons, Respondent respectfully suggests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

STATE OF TEXAS)
COUNTY OF DALLAS)

Before me, the undersigned Notary Public in and for the State of Texas, on this day personally appeared Lawrence B. Mitchell, who being duly sworn, upon oath stated: I, Lawrence B. Mitchell, am a member of the Bar of the Supreme Court of the United States and have been appointed as attorney of record for Respondent, Haron Stephens.

I further state upon oath that on the 25th day of September, 1991, I served copies of the foregoing Respondent's Brief in Opposition to a Writ of Certiorari to the Texas Court of Criminal Appeals on the Petitioner by depositing same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to wit: Charles A. Palmer, Assistant Attorney General, P.O. Box 12548, Capital Station, Austin, Texas 78711.

Lawrence B. Mitchell
LAWRENCE B. MITCHELL

SUBSCRIBED AND SWORN to before me by the said Lawrence B. Mitchell, this 25th day of September, 1991.

STEPHANIE HOPKINS
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
OCTOBER 7, 1992

Stephanie Hopkins
Notary Public
State of Texas, County of Dallas

Comm. exp: 10-7-92